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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

NO. 79-6630

ORIGINAL COPY

ALICE C. ROCHE, ET AL, Appellant

v.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellee

MOTION TO DISMISS OR AFFIRM ON BEHALF OF BIG MOOSE OIL FIELD TRUCK SERVICE AND RELIANCE INSURANCE COMPANY

PLAUCHE, SMITH, HEBERT & NIESET
JAMES R. NIESET
1123 Pithon Street
P. O. Drawer 1705
Lake Charles, LA 70602

NO. 79-6630

SUPREME COURT OF THE UNITED STATES

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BRIEF TO THE COURT OF APPEAL, EXHIBIT "A"

BRIEF TO THE SUPREME COURT, EXHIBIT "B"

MAY IT PLEASE THE COURT:

BIG MOOSE OILFIELD TRUCK SERVICE and RELIANCE INSURANCE COMPANY move this honorable court to dismiss the appeal, or to affirm the decision below, on the grounds that the questions on which the decision of the cause depends are not such as to require further argument in this Court, and do not present any substantial federal question for review.

STATEMENT OF THE CASE

This lawsuit arises from the death of J.D. Roche on September 3, 1975. Appellant is his widow, Alice C. Roche. She filed suit for herself and for two minors, Dawn Rachelle Robinson and William Donald Robinson, whom she has adopted since her husband's death.

In the lawsuit, plaintiff alleged that she was entitled to recover wrongful death benefits under the Louisiana Wrongful Death Statute for herself and the two minors. The claims of the minors were rejected by the trial court because they were not children of the deceased at the time of his death. He was not their biological father and had never adopted them. The trial court held that the provisions of the Louisiana Wrongful Death Statute, contained in Article 2315 of the Louisiana Civil Code, apply only to biological children of the deceased, and not to others who may be in the process of being adopted by him. Implicit in that holding was a re-affirmation of the traditional legal view that children do not become children by adoption of the adopting parent until the adoption is complete.

The decision of the trial court was affirmed by the Third Circuit Court of Appeal in the State of Louisiana and by the Louisiana Supreme Court.

Appellant takes the position that the application of Article 2315 in this case deprives "minor children" of constitutionally protected rights, citing the decision of this court in Levy v. Louisiana, 88 S. Ct. 1509 (1968). In fact, appellant's whole argument is based on the idea that denial of wrongful death rights to someone dependent on the decedent, is somehow unconstitutional.

A distinction must be drawn between Levy and this case, and the distinction is obvious. In Levy, and related cases, the children were in fact children of the decedent. That is not the case here.

This case deals with minors who were in the process of being adopted by the decedent at the time of his death. The adoption was not final. The children had not become his children.

This is not a case where discrimination takes place against one class of biological children of the deceased as opposed to another class. Rather, this case is a re-affirmation of the traditional rules dealing with adoption, that is, that adoption is not complete until the final decreee. This is not a case of a "finally carved distinction." Rather, it involves a simple matter of determining when a child becomes adopted. Obviously adoption, just as marriage and divorce, must begin at some point. Until that point is passed, the legal rights which flow from adoption do not take hold. That point had not been passed here, and the legal rights which would flow from adoption under the statute can not flow in this case.

What appellant would have this court do is re-write the Louisiana Wrongful Death Statute to substitute the word "dependent" for the word "child". That is not the function of this court.

The application of Article 2315 in this case is uniform and non-discriminatory. Traditional and well-settled legal principles were applied in reaching it. This is not a substantial federal question requiring review by this court.

Appellant attaches to this motion copies of its brief to the Louisiana Supreme Court and to the Third Circuit Court of Appeal. Those briefs review in detail the specific Louisiana authority applicable in this case.

CONCLUSIONS

This is not a case of denial of federally protected rights. It is a case in which well-settled principles of adoption were applied to determine that minors were not adopted by the decedent prior to his death. That is a uniform and non-discriminatory rule.

Since the minors were not adopted by the deceased prior to his death, they could not be his children under the terms of the statute. That statute was applied in a non-discriminatory fashion in this case. It operates to allow the wrongful death recovery to any child, biological or adopted, of the deceased. It operates to deny those rights to anyone not a child of the deceased, regardless of how dependent he might have been on the deceased. The test applied under the statute, in a uniform and non-discriminatory manner, is the parent-child relationship, not a dependency relationship. No matter how much plaintiff might wish it otherwise, the application of that statute does not unconstitutionally deny the minors in this case any rights to which they are entitled. The law simply does not allow recovery for wrongful death under the statute to dependents who are not children of the deceased. The appeal should be dismissed, or the decision of the Louisiana

Supreme Court affirmed.

Respectfully Submitted,

PLAUCHE, SMITH, HEBERT & NIESET

BY: James R. Nieset

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COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

NO. 6988

ALICE C. ROCHE, ET AL

Plaintiff - Appellant

VERSUS

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL.

Defendant - Appellee

APPEAL FROM THE
FIFTEENTH JUDICIAL DISTRICT COURT FOR
THE PARISH OF ACADIA

NO. 40,722

HONORABLE DOUGLAS J. NEHRBASS, JUDGE

ORIGINAL BRIEF ON BEHALF OF RELIANCE INSURANCE COMPANY AND BIG MOOSE OIL FIELD TRUCK SERVICE

Defendant - Appellee

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Attorney for Defendant - Appellee

NO. 6988

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

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STATEMENT OF MATERIAL FACTS

This lawsuit arises from the death of J. D. Roche on December 3, 1975. Appellant is his wife, Alice C. Roche, who filed suit individually and on behalf of the minors Dawn Rachelle Robinson and William Donald Robinson.

Appellant's claims on behalf of the minors were rejected by the trial court because they were not children of the deceased at the time of his death since he was not their biological father and had not adopted them. She was also required to intervene in the tort suit previously filed by her husband's employer's workman's compensation insurer in order to assert her own claims.

Insofar as the rejection of the wrongful death claims sought to be asserted on behalf of the minors, the only truly material facts on this appeal are the dates showing that the minors were not adopted children of the deceased at the time of his death, those being the date of petition for adoption, November 19, 1975; the date of death, December 3, 1975; and the date of adoption of the minors by Alice C. Roche, individually, January 5, 1976. However, since Appellant discusses the whole adoption process in her brief, the following chronology is presented.

Those minor children were placed in the home of J. D. and Alice Roche by the Louisiana Department of Health and Human Resources, as abandoned children, on April 21, 1972. (Plaintiff's brief, p. 4). A petition for their adoption was filed on November 19, 1975. (Tr. p. 23). The order attached to the petition for adoption, which has been introduced in the record and is found as cited above, set a hearing on the petition for adoption for January 5, 1976.

J. D. Roche died on December 3, 1975. On December 2, 1976, Liberty Mutual Insurance Company, the workmen's compensation carrier for J. D. Roche's employer at the time of his death, filed suit to recover compensation benefits. That suit, entitled "Liberty Mutual Insurance Company vs. Reliance Insurance Company, Big Moose Oil Field Truck Service, Inc., and Gardner Lacombe", bears number 40,722 on the docket of the 15th Judicial District Court, Parish of Acadia. One day later, on December 3, 1976, Alice C. Roche filed this suit entitled "Alice C. Roche v. Big Moose Oil Field Truck Service, Inc., et al.", which bears number 40,732 on the docket of the 15th Judicial District Court.

Preemptory exceptions raising the objections of no cause of action and no right of action were filed on behalf of Big Moose Oil Field Truck Service, Inc., and Reliance Insurance Company on the grounds that plaintiff should have intervened in the suit filed by Liberty Mutual and that there were no claims on behalf of the minors, William Donald Robinson and Dawn Rachelle Robinson for the wrongful death of J. D. Roche, since they were not his children. From a judgment maintaining those exceptions, Alice Roche has brought this appeal.

REPLY TO APPELLANT'S SPECIFICATIONS OF ERROR

Appellee will respond to Appellant's specifications of error in inverse order since her second specification can be discussed more briefly.

REPLY TO APPELLANT'S SPECIFICATIONS OF ERROR NUMBER II

Appellant complains of being required to intervene in the suit filed by Liberty Mutual instead of being able to prosecute her own action.

The basis of the requirement that she intervene is set forth by the trial judge in his Reasons for Judgment

(Tr. p. 24, 25). The provisions of Louisiana Revised Statutes 23:1102 allow the employee (or one suing on his behalf) or the employer, to intervene in a suit filed by the other against a third-party.

The Louisiana Supreme Court has held unequivocally that the cited statute requires intervention. In National Surety Corp. v. Standard Acc. Ins. Co., 247 La. 905, 175 So2d 263 (Sup.Ct. 1965), the Court said:

> "L.S.A.R.S. 23:1101, 23:1102, 23:1103, supra, do not set forth whether the injured employee or employer or the employer's insurer shall sue first; when one files suit, however, the other, if he desires recovery must intervene." (Emphasis added).

Appellant has not cited a single case which questions that holding by the Court interpreting those sections of the workmen's compensation statute, and research by Appellee discloses no cases questioning that holding.

Plaintiff suggests that the case of Allstate Ins. Co. v. Louisiana Gas Service Co., 344 So2d 386 (La.App. 4th Cir., 1977) restricts the holding in National Surety to prescription cases. That is not correct. Allstate was not a workmen's compensation case and dealt only with a prescription issue which was similar to a prescription issue discussed in National Surety. The Court in no way restricted, modified or questioned the language of National Surety regarding the procedure to be followed for intervention in a tort suit against a third-party.

When suit was filed by Liberty Mutual Insurance Company under Docket No. 40,722, 15th Judicial District Court, on December 2, 1976, Appellant was required to intervene in that lawsuit to assert her claims against the third party. Her suit, filed one day later, was not proper. The trial judge correctly granted the exception, requiring her to intervene in the suit previously filed by the workmen's compensation insurer.

REPLY TO APPELLANT'S SPECIFICATION OF ERROR NUMBER I

Appellant urges this Court to permit her to bring suit for the wrongful death of her husband, not only for herself, but on behalf of the minor children who were not adopted by her or by the decedent at the time of his death. Her claim is without legal merit.

Recovery for wrongful death is provided by Article 2315 of the Louisiana Civil Code. In pertinent part, that article provides:

> "The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children . . .
>
> * * *
>
> "As used in this article, the words 'child', 'brother', 'sister', 'father', and 'mother' include a child, brother, sister, father, and mother, by adoption, respectively."

Since the minor children were never adopted by J. D. Roche, they are not children by adoption in order to permit wrongful death recovery to them for his death.

This Court had an occasion to consider virtually the identical legal problem, in a slightly different factual context, in the case of Bertrand v. State Farm Fire & Casualty Co., 333 So2d 322 (La.App. 3rd Cir. 1976). There the decedent was the child and the question was who was entitled to the action for his wrongful death; the "parents" who had petitioned for adoption, or the "natural parents". Even though a petition for adoption had been filed and an Interlocutory Decree had been rendered, this Court found that the "natural parents" were entitled to the action, since the adoption had

not been finalized so as to make the decedent an "adopted child" within the provisions of Article 2315. There is absolutely no reason why the same rule should not apply in this case.

Appellant suggests that her good faith compliance with adoption procedures, and the fact that the children were dependent on her husband, should somehow change the well-established legal rule, and permit wrongful death recovery on behalf of the children, even though they were not adopted at the time of the alleged wrongful death.

Appellant suggests that she and her husband had moved with all dispatched to secure the adoption of the children, and that the untimely death of Mr. Roche occurred only two days before the adoption could have been finalized. The record, however, reflects otherwise.

The children were placed in Appellant's home on April 21, 1972. A petition for their adoption was not filed until November 19, 1975. Adoption was sought under the provisions of Louisiana Revised Statutes 9:434, the procedure permitting a final decree to be granted at the first hearing where the child has been placed in the home by an agency and has resided in the home for at least six months. These children had resided in the Roche home for two years and seven months before the petition for their adoption was filed.

The order attached to the petition filed November 19, 1975, (Tr., p. 23), shows that at the time the petition was filed on November 19, 1975 a hearing was set for January 5, 1976. Appellant suggests in her brief that a hearing on the adoption could have been had within fifteen (15) days of service, suggesting further that the hearing could have come only two days after the date Mr. Roche died. That

is not correct. Revised Statutes 9:428 provides impertinent part as follows:

> "The court shall set a time and place for the hearing of the petition not less than thirty nor more than sixty days after completion of service of process."

Even if service of process on all required parties could have been made the day the petition was filed, the earliest date which a hearing could have been set was December 19, 1975.

Plaintiff's argument that this is a case in which decedent's death prevented by only a very few days an adoption which otherwise would have taken place is not substantiated by the record.

Appellant also suggests that the dependency of the two children on the deceased should be considered in determining their right to recover for his wrongful death. In support of that position, Appellant cites a number of cases in which illegitimate children, natural children, and posthumous children have been allowed wrongful death recovery under the provisions of Article 2315.

In each of those cases, the child allowed recovery bore a legal parent-child relationship to the deceased. That is precisely the distinction between those cases and this one. Here, the legal relationship did not exist because the adoption was not granted during decedent's lifetime.

The provisions of Article 2315 permitting wrongful death recovery in favor of the successive classes are strictly construed. One must be a member of the class in whose favor the right survives in order to recover. This has been held, not only in the case of adoption, as in Bertrand, but also in the case of marriage.

In Clark v. Tenneco, Inc., 353 So2d 418 (La.App. 4th Cir. 1978), the question was whether wrongful death

recovery should lie in favor of a wife, who had been separated from the deceased for over two years without a legal separation having been granted, or his parents, with whom he had lived for at least two years preceding his death. The Court held the wife entitled to recover since the marriage relationship never had been legally terminated. The Court also recognized the fact that the equitable considerations in favor of the parents over the separated wife should not be permitted to affect recovery, saying:

> "Appellant correctly concedes that where there is specific law, there is no remedy in equity under Louisiana Civil Code Article 21."

In our situation, too, there is specific law. Wrongful death recovery in favor of "the surviving spouse and child or children of the deceased" is extended to "children . . . by adoption". Although a petition for adoption had been filed, as had a petition for separation in the Clark case, the adoption was not finalized and the children were not children by adoption of J. D. Roche at the time of his death. In fact, they were never children by adoption of J. D. Roche.

For an adoption to be legally effective, all formal requisites must be strictly complied with. Our Supreme Court so held in Roy v. Speer, 249 La 1034, 192 So2d 554 (Sup. Ct. 1966), where the Court said:

> "Although adoption prevailed among Biblical ancients and other civilizations of antiquity; had reached a high level of development by Justinian times, to whose institutes our civil law is traceable; and was known early in Louisiana under Spanish law, it was never considered an inherent right here and, after Louisiana became a state, it was specifically abolished by the civil codes of 1808 and 1825.

> Adoption was not permitted in this state, therefore, until, following specific authorization in the Constitution of 1864, Act 48 of 1865 was passed, any adoption prior thereto being only on an individual basis and effected through a specific legislative act. As stated in Green v. Paul, 212 La. 337, 31 So2d 819, 'It has been firmly settled by this court that adoption is a creature of statute; that, this being so, it is only what the law makes it and that, to establish the relation, the statutory requirements must be strictly carried out, otherwise, the adoption is a nullity.' See, also, Succession of Gambino, 225 La. 674, 73 So.2d 800; Madere v. Long, 231 La. 498 91 So.2d 771; In re Ackenhausen, 244 La. 730, 154 So.2d 380, and the authorities therein cited."

Absent compliance with the legal formalities, there can be no adoption. The minors here never became children by adoption of J. D. Roche, and cannot recover for his alleged wrongful death.

Having discussed plaintiff's essentially equitable arguments in favor of allowing recovery on behalf of the minor children even though they were not adopted children at the time of the death of J. D. Roche, we refer back to the Bertrand case. There, a petition for adoption had been filed and an Interlocutory Decree of adoption had been rendered. The final decree was pending but had not been secured. Under those circumstances, the Court still held that the final decree of adoption was an absolute requirement to create the status of adopted child to permit 2315 recovery.

> "We conclude that since the final decree of adoption had not been granted, Mr. and Mrs. Bertrand, Sr. were not the mother and father of the child 'by adoption' within the meaning of LSA - C.C. Art. 2315, and they have no right of action for the child's death."

If the parents by adoption have no right of action for the wrongful death of the child where the adoption is not complete, certainly the child whose adoption is not

complete has no right of action for the wrongful death of the parent.

CONCLUSIONS

When either the employer or the employee files a tort suit against a third party, the other must intervene in that suit to assert his rights, not file a separate suit. The exception raising that procedural defect in plaintiff's original petition was properly maintained by the trial judge.

Article 2315 of the Louisiana Civil Code permits recovery for wrongful death only to children of the deceased. Since the minors were not the natural or biological children of J. D. Rocho, they could have become his children only by adoption. While the adoption process was begun before his death, it was not finalized and he never adopted them. They have no claim for his wrongful death and the exception was correctly maintained by the District Court.

Respectfully submitted,

PLAUCHE, SMITH, HEBERT & NIESET

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SUPREME COURT OF LOUISIANA

DOCKET NO. 65,285

ALICE C. ROCHE, ET AL.

versus

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL.

WRIT OF REVIEW TO THE COURT OF APPEAL,
THIRD CIRCUIT
STATE OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF DEFENDANTS-APPELLEES, BIG MOOSE OIL FIELD TRUCK SERVICE and RELIANCE INSURANCE COMPANY

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SUPREME COURT OF LOUISIANA

DOCKET NO. 65,285

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CONCLUSIONS . . . . . PAGE 14

STATEMENT OF FACTS

This lawsuit arises from the death of J. D. Roche on December 3, 1975. Appellant is his wife, Alice C. Roche, who filed suit individually and on behalf of the minors Dawn Rachelle Robinson and William Donald Robinson.

Applicant's claims on behalf of the minors were rejected by the trial court because they were not children of the deceased at the time of his death since he was not their biological father and had not adopted them. She was also required to intervene in the tort suit previously filed by her husband's employer's workman's compensation insurer in order to assert her own claims.

Insofar as the rejection of the wrongful death claims sought to be asserted on behalf of the minors, the only truly material facts on this appeal are the dates showing that the minors were not adopted children of the deceased at the time of his death, those being the date of petition for adoption, November 19, 1975; the date of death, December 3, 1975; and the date of adoption of the minors by Alice C. Roche, individually, January 5, 1976. However, since Appellant discusses the whole adoption process in her brief, the following chronology is presented.

Those minor children were placed in the home of J. D. and Alice Roche by the Louisiana Department of Health and Human Resources, as abandoned children, on April 21, 1972.

(Plaintiff's brief, p. 4). A petition for their adoption was filed on November 19, 1975. (Tr. p. 23). The order attached to the petition for adoption, which has been introduced in the record and is found as cited above, set a hearing on the petition for adoption for January 5, 1976.

J. D. Roche died on December 3, 1975. On December 2, 1976, almost one year later, Liberty Mutual Insurance Company, the workmen's compensation carrier for J. D. Roche's employer at the time of his death, filed suit to recover compensation benefits. That suit, entitled "Liberty Mutual Insurance Company v. Reliance Insurance Company, Big Moose Oil Field Truck Service, Inc., and Gardner Lacombe", bears number 40,722 on the docket of the 15th Judicial District Court, Parish of Acadia. One day later, on December 3, 1976, Alice C. Roche filed this suit entitled "Alice C. Roche v. Big Moose Oil Field Truck Service, Inc., et al.", which bears number 40,732 on the docket of the 15th Judicial District Court.

Preemptory exceptions raising the objections of no cause of action and no right of action were filed on behalf of Big Moose Oil Field Truck Service, Inc., and Reliance Insurance Company on the grounds that plaintiff should have intervened in the suit filed by Liberty Mutual and that there were no claims on behalf of the minors, William Donald Robinson and Dawn Rachelle Robinson for the wrongful death of J. D. Roche, since they were not his children. From a judgment maintaining those exceptions, Alice Roche has brought this appeal.

OBJECTION TO APPELLANT'S
ARGUMENT ON ASSIGNMENT OF ERROR I -
"RIGHT OF ACTION OF THE MINOR CHILDREN"

In her argument on the right of action of the minor children, plaintiff refers to the contract entered into between herself and the Department of Public Welfare, specifically quoting language from that contract and relying on it in her argument on her duty to support the minor children.

The contracts referred to have not been introduced in evidence and are not part of the record in this case. Appellees have not had a chance to review those contracts. Appellees vigorously oppose to any reference to those documents since they are not in the record and to any part of Appellant's argument based on those documents. For that reason, Appellees urge the Court to reject entirely the "contractual obligation" section of Appellant's arguments, as it is based on documents which do not form part of the record in this case.

REPLY TO APPELLANT'S ARGUMENT ON
ASSIGNMENT OF ERRORS I(A)
CONTRACTUAL OBLIGATION

While, as just stated, the documents which form the basis for the argument in this section are not part of the record, and this entire section should be disregarded by the Court, even if it were to be considered, it would not materially affect the outcome.

Appellant seeks to find some way to convince this Court that Article 2315 of the Louisiana Civil Code means something other than what it says. That article specifically extends the right to recover for wrongful death, a purely statutory recovery, beyond the scope of its terms. The

article very specifically extends the right to recover to certain designated persons. In the case of a spouse and children, the right is extended to the spouse and surviving children, including adopted children. The article very simply makes no provision for children other than children related by blood or by adoption. Since these children were not adopted at the time of the death of Mr. Roche, and since they were not related to him by blood, they are not entitled to recover for his wrongful death under the Wrongful Death Statute no matter what obligation he may have assumed for their support.

Appellant argues the so-called doctrine of "equitable adoption". The doctrine is unrecognized in Louisiana courts. In fact, Appellant cites only two rather old cases from Utah and Nevada in support of the proposition.

In an annotation entitled "Death-Action by or for Adopted Child", found in 94 ALR 2d at p. 37 et seq., the following comment is made:

> "The right of an equitably adopted child to maintain or benefit by an action for the wrongful death of the child's alleged adoptive parent has been almost universally denied, on the theory that if the statutory adoption procedure had not been followed, the child could not be one of those surviving 'children' designated as beneficiaries under the wrongful death act."

That is exactly the argument which Appellees have advanced in this case from the very first filing of the Exception of No Right of Action. Thus the two cases cited by Appellant purporting to favor the doctrine of "equitable adoption" are in a very distinct minority.

It is also noted that in the case of In Re Williams cited by Appellant, the question was not whether the "equitably adopted" child could recover for the wrongful death of the parent, but rather whether he was entitled to a share of the parent's estate. In that case, the contract which created the "equitable adoption", apparently also included a provision requiring the adopting parents to make the child their heir."

In the case of Limbaugh v. Woodall, 121 GA App. 638, 175 SE 2d 135 ( ), the Court specifically held that a child whose adoption was completed after the death of one prospective adoptive parent was not entitled to maintain an action for the wrongful death of that parent. It is exactly the situation facing the court in this case, and the decision of the trial court here was in accordance with that majority rule denying the right to bring a wrongful death action to one not legally related to the decedent and provided a right to recover by the Wrongful Death Statute.

REPLY TO APPELLANT'S ARGUMENT ON
ASSIGNMENT OF ERROR I(B)
"DEPENDENT STATUS"

Appellant argues that the minor children should be allowed a wrongful death recovery because they were dependent on Mr. Roche at the time of his death. Dependency is not, and never has been, the test for recovery for wrongful death under the statute.

At the outset, it is noted that all of the cases advanced by plaintiff purporting to establish a right to recovery on the basis of dependency in fact established the right on the basis of legal relationship.

In our case, the children were neither the biological nor adopted children of J. D. Roche at the time of his death, and have no legal basis on which to claim recovery for his wrongful death. This is not a case of excluding illegitimate children. It is, rather, a case of requiring the legal relationship set forth in the Wrongful Death Statute before allowing recovery under that statute.

REPLY TO APPELLANT'S SPECIFICATION OF ARGUMENT ON ASSIGNMENT OF ERRORS I(C) "POSTHUMOUS CHILDREN"

Appellant argues that the status of William and Dawn Robinson can easily be compared to that of posthumous children. Appellees vigorously dispute that assertion. Posthumous children are blood children of the deceased parent. The parent is biologically and legally responsible for the creation of their life. The law simply chooses to recognize the fulfillment of that relationship by posthumous birth.

In the case of adoption, the children do not become the legal children of the adopting parent until the time of adoption. Prior to that time, they bear him no special legal relationship as children.

In the case of posthumous children, the relationship of parent and child is created at the instant of conception. In the case of adopted children, the relationship of parent and child is created only at the instant of the judgment decreeing the adoption. In the present case, since no such judgment had been signed, there was no legal relationship of parent and child at the time of J. D. Roche, and there can be no recovery for his wrongful death by the Robinson children.

GENERAL REPLY TO APPELLANT'S SPECIFICATION OF ERROR I

Appellant urges this Court to permit her to bring suit for the wrongful death of her husband, not only for herself, but on behalf of the minor children who were not adopted by her or by the decedent at the time of his death. Her claim is without legal merit.

Recovery for wrongful death is provided by Article 2315 of the Louisiana Civil Code. In pertinent part, that article provides:

> "The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of; (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children . . .
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> * * *
>
> "As used in this article, the words 'child', 'brother', 'sister', 'father', and 'mother' include a child, brother, sister, father and mother, by adoption, respectively."

Since the minor children were never adopted by J. D. Roche, they are not the children by adoption in order to permit wrongful death recovery to them for his death.

The Third Circuit Court had an occasion to consider virtually the identical legal problem, in a slightly different factual context, in the case of Bertrand v. State Farm Fire & Casualty Co., 333 So.2d 322 (La.App. 3d Cir. 1976). There the decedent was the child and the question was who was entitled to the action for his wrongful death; the "parents" who had petitioned for adoption, or the "natural parents".

Even though a petition for adoption, had been filed and an Interlocutory Decree had been rendered, the Third Circuit Court found that the "natural parents" were entitled to the action, since the adoption had not been finalized so as to make the decedent an "adopted child" within the provisions of Article 2315. There is absolutely no reason why the same rule should not apply in this case.

Appellant suggests that her good faith compliance with adoption procedures, and the fact that the children were dependent on her husband, should somehow change the well-established legal rule, and permit wrongful death recovery on behalf of the children, even though they were not adopted at the time of the alleged wrongful death.

Appellant suggests that she and her husband moved with all disptached to secure the adoption of the children, and that the untimely death of Mr. Roche occurred only two days before the adoption could have been finalized. The record, however, reflects otherwise.

The children were placed in Appellant's home on April 21, 1972. A petition for their adoption was not filed until November 19, 1975. Adoption was sought under the provisions of Louisiana Revised Statutes 9:434, the procedure permitting a final decree to be granted at the first hearing where the child has been placed in the home by an agency and has resided in the home for at least six months. These children had resided in the Roche home for two years and seven months before the petition for their adoption was filed.

The order attached to the petition filed November 19, 1975, (Tr. p. 23), shows that at the time the petition was filed on November 19, 1975 a hearing was set for January 5, 1976. Appellant suggests in her brief that a hearing on the adoption could have been had within fifteen (15) days of service, suggesting further that the hearing could have come only two days after the date Mr. Roche died. That is not correct. Revised Statute 9:428 provides in pertinent part as follows:

> "The court shall set a time and place for the hearing of the petition not less than thirty nor more than sixty days after completion of service of process."

Even if service of process on all required parties could have been made the day the petition was filed the earliest date which a hearing could have been set was December 19, 1975.

Appellant's argument that this is a case in which decedent's death prevented by only a very few days an adoption which otherwise would have taken place is not substantiated by the record.

Appellant also suggests that the dependency of the two children on the deceased sould be considered in determining their right to recover for his wrongful death. In support of that position, Appellant cites a number of cases in which illegitimate children, natural children, and posthumous children have been allowed wrongful death recovery under the provisions of Article 2315.

In each of those cases, the child allowed recovery bore a legal parent-child relationship to the deceased. That is precisely the distinction between those cases and this one. Here, the legal relationship did not exist because the adoption was not granted during decedent's lifetime.

The provisions of Article 2315 permitting wrongful death recovery in favor of the successive classes are strictly construed. One must be a member of the class in whose favor the right survives in order to recover. This has been held, not only in the case of adoption, as in Bertrand, but also in the case of marriage.

In Clark v. Tenneco, Inc., 353 So.2d 418 (La.App. 4th Cir. 1978), the question was whether wrongful death recovery should lie in favor of a wife, who had been separated from the deceased for over two years without a legal separation having been granted, or his parents, with whom he had lived for at least two years preceding his death. The Court held the wife entitled to recover since the marriage relationship never had been legally terminated. The Court also recognized the fact that the equitable considerations in favor of the parents over the separated wife should not be permitted to affect recovery, saying:

> "Appellant correctly concedes that where there is specific law, there is no remedy in equity under Louisiana Civil Code Article 21."

In our situation, too, there is specific law. Wrongful death recovery in favor of "the surviving spouse and child or children of the deceased" is extended to

"children . . . by adoption". Although a petition for adoption had been filed, as had a petition for separation in the Clark case, the adoption was not finalized and the children were not children by adoption of J. D. Roche at the time of his death. In fact, they were never children by adoption of J. D. Roche.

For an adoption to be legally effective, all formal requisites must be strictly complied with. This Court so held in Roy v. Speer, 249 La. 1034, 192 So.2d 554 (Sup. Ct. 1966), where the Court said:

> "Although adoption prevailed among Biblical ancients and other civilizations of antiquity; had reached a high level of development by Justinian times, to whose institutes our civil law is traceable; and was known early in Louisiana under Spanish law, it was never considered an inherent right here and, after Louisiana became a state, it was specifically abolished by the civil codes of 1808 and 1825. Adoption was not permitted in this state, therefore, until, following specific authorization in the Constitution of 1864, Act 48 of 1865 was passed, any adoption prior thereto being only on an individual basis and effected through a specific legislative act. As stated in Green v. Paul, 212 La. 337, 31 So.2d 819, 'It has been firmly settled by this court that adoption is a creature of statute; that, this being so, it is only what the law makes it and that, to establish the relation, the statutory requirements must be strictly carried out, otherwise, the adoption is a nullity.' See, also, Succession of Gambino, 225 La. 674, 73 So.2d 800; Madere v. Long, 231 La. 498 91 So.2d 771; In re Ackenhausen, 244 La. 730, 154 So.2d 380, and the authorities therein cited."

Absent compliance with the legal formalities, there can be no adoption. The minors here never became

children by adoption of J. D. Roche, and cannot recover for his alleged wrongful death.

Having discussed plaintiff's essentially equitable arguments in favor of allowing recovery on behalf of the minor children even though they were not adopted children at the time of the death of J. D. Roche, we refer back to the Bertrand case. There, a petition for adoption had been filed and an Interlocutory Decree of adoption had been rendered. The final decree was pending but had not been secured. Under those circumstances, the Court still held that the final decree of adoption was an absolute requirement to create the status of the adopted child to permit 2315 recovery.

> "We conclude that since the final decree of adoption had not been granted, Mr. and Mrs. Bertrand, Sr. were not the mother and father of the child 'by adoption' within the meaning of LSA - C.C. Art. 2315, and they have no right of action for the child's death."

If the parents by adtoption have no right of action for the wrongful death of the child where the adoption is not complete, certainly the child whose adoption is not complete has no right of action for the wrongful death of the parent.

REPLY TO APPELLANT'S SPECIFICATION OF ERROR II - NEED FOR INTERVENTION BY EMPLOYEE

The provisions of Louisiana Revised Statutes 23:1102 allow the employee (or one suing on his behalf) or

the employer, to intervene in a suit filed by the other against a third party.

The Louisiana Supreme Court has held unequivocally that the cited statute requires intervention. In National Surety Corp. v. Standard Acc. Ins. Co., 247 La. 905, 175 So.2d 263 (Sup. Ct. 1965), the Court said:

> "L.S.A.R.S. 23:1101, 23:1102, 23:1103, supra, do not set forth whether the injured employee or employer or the employer's insurer shall sue first; when one files suit, however, the other, if he desires recovery must intervene." (Emphasis added).

Appellant has not cited a single case which questions that holding by the Court interpreting those sections of the workmen's compensation statute, and research by Appellee discloses no cases questioning that holding.

Plaintiff suggests that the case of Allstate Ins. Co. v. Louisiana Gas Service Co., 344 So.2d 386 (La.App. 4th Cir., 1977) restricts the holding in National Surety to prescription cases. That is not correct. Allstate was not a workmen's compensation case and dealt only with a prescription issue which was similar to a prescription issue discussed in National Surety. The Court in no way restricted, modified or questioned the language of National Surety regarding the procedure to be followed for intervention in a tort suit against a third party.

When suit was filed by Liberty Mutual Insurance Company under Docket No. 40,722, 15th Judicial District Court, on December 2, 1976, Appellant was required to intervene in that lawsuit to assert her claims against the

third party. Her suit, filed one day later, was not proper. The trial judge correctly granted the exception, requiring her to intervene in the suit previously filed by the workmen's compensation insurer.

REPLY TO APPELLANT'S ARGUMENT ON SPECIFICATION OF ERROR III - VALIDITY OF APPEAL AS TO FRED WILSON DEFENDANTS

Appellees Big Moose Oil Field Truck Service and Reliance Insurance Company are not involved in this specification of error.

CONCLUSIONS

The decision of the District Court requiring Alice Roche to intervene in the tort suit previously filed by the workmen's compensation insurer was in accordance with the provisions of the Workmen's Compensation Act and the interpreting jurisprudence. The rule promotes order and stability. It works no injustice on Appellant in this case and she shows no reasonable basis for it being changed.

Although Appellant has tried valiantly, she can show this Court no legal or blood relationship between her deceased husband and the minor children on whose behalf she seeks to assert a claim for his wrongful death. Such a legal or blood relationship is an absolute prerequisite to an action for wrongful death. The decision of the trial court maintaining the preemptory exception raising the exception of no right of action on that basis, was properly granted and should not be disturbed.

Respectfully submitted,

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